UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA, and STATE OF TEXAS, Plaintiffs, v. KIMBERLY-CLARK CORPORATION, and SCOTT PAPER COMPANY, Defendants.	Civil No.: 3:95 CV 3055-P Filed: December 12, 1995

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, and the State of Texas, acting under the direction of the Attorney General of Texas, bring this civil action to obtain equitable and other relief against the defendants named and allege as follows:

1. The United States and the State of Texas bring this antitrust case to prevent the proposed acquisition by Kimberly-Clark Corporation ("Kimberly-Clark") of Scott Paper Company ("Scott"). The acquisition threatens to raise prices and harm consumers in two important areas of retail commerce: facial tissue and baby wipes.

2. Facial Tissue. Three major brands of facial tissue are sold at retail to consumers: Kimberly-Clark's Kleenex®, Scott's Scotties® (recently renamed Scott®), and Procter & Gamble's Puffs®. Scotties® is a value brand that has an important effect in constraining prices in this market. Total sales in the retail facial tissue market in 1994 were $1.34 billion.

3. Kimberly-Clark's acquisition of Scott would leave Kimberly-Clark in control of approximately 59 percent of this important consumer market, with nearly twice the share of any other producer. With the elimination of Scott as an important rival, Kimberly-Clark would acquire the power to increase prices of retail facial tissue, both unilaterally and in coordination with its major remaining rival in the market.

4. Baby Wipes. Kimberly-Clark and Scott are the nation's leading producers of baby wipes, which are soft, premoistened, folded towelettes, used by consumers for baby care. Kimberly-Clark with its Huggies® brand and Scott with its Baby Fresh® and Wash A Bye Baby® brands are the leading manufacturers of baby wipes. Together, they account for over 50 percent of sales in this $500 million market. Each is the most significant competitive constraint on the other's prices, and the vigorous rivalry between these competitors has led to technological improvements in the quality and convenience of baby wipes.

5. With its acquisition of Scott, Kimberly-Clark would eliminate its most significant competitor in the sale of baby wipes and acquire the power to increase prices.

I. JURISDICTION AND VENUE

6. This action is filed under Sections 15 and 16 of the Clayton Act, 15 U.S.C. §§ 25 and 26, to prevent and restrain the violation by defendants, as hereinafter alleged, of Section 7 of the Clayton Act, 15 U.S.C. § 18.

7. Kimberly-Clark and Scott sell facial tissue, baby wipes, and other products in interstate commerce. The Court has jurisdiction over this action and over the parties pursuant to 15 U.S.C. § 22, and 28 U.S.C. §§ 1331 and 1337.

8. Both Kimberly-Clark and Scott transact business in this District. Venue is proper in this District under 28 U.S.C. § 1391(c).

II. THE DEFENDANTS

9. Kimberly-Clark is a Delaware corporation with headquarters in Dallas, Texas. It is a major producer of paper products, including disposable diapers, bath tissue, facial tissue and baby wipes. In 1994, Kimberly-Clark reported total sales of $7.3 billion. Kimberly-Clark sells facial tissue under the Kleenex® brand name, and baby wipes under the Huggies® brand name.

10. Scott is a Pennsylvania corporation with headquarters in Boca Raton, Florida. It is a major producer of paper products, including bath tissue, facial tissue and baby wipes. In 1994, Scott reported total sales of $3.5 billion. Scott sells facial tissue under the Scotties® (recently renamed Scott®) brand name, and baby wipes under the Baby Fresh® and Wash A Bye Baby® brand

names.

III. TRADE AND COMMERCE

A. Consumer Facial Tissue

11. Facial tissue is a soft, thin, pliable, and absorbent sheet of paper about 8" x 9" in size and typically packaged in a decorative box. People use facial tissue to blow their noses, catch a sneeze, or remove makeup. Facial tissue is designed to be disposable; consumers usually use it once, then throw it away.

12. Relevant Product Market. Facial tissue holds several distinct advantages over other paper and cloth products, such as cloth handkerchiefs, paper towels, napkins, and bath tissue. Facial tissue's unique combination of softness, strength, sanitation, and disposability makes it a superior alternative for its intended uses, with no good substitutes.

13. Manufacturers of facial tissue sell it to retail outlets (grocery, drug, club and convenience stores and mass merchandisers), which in turn resell it to consumers. This "retail" facial tissue is packaged in decorative boxes to appeal to individual consumers' aesthetic tastes. It comes in a variety of convenient package sizes and sheet counts.

14. Facial tissue manufacturers also sell to distributors who cater to institutional accounts such as hotels, hospitals, and office buildings, who in turn provide facial tissue as a courtesy to their employees and clients. This commercial and institutional ("C&I") facial tissue is generally sold in packaging that is less attractive than the packaging for retail

facial tissue.

15. Retail facial tissue and C&I facial tissue are packaged differently, priced independently, and sold in separate distribution channels. Producers engage in separate marketing efforts for each of these products. Sales of C&I facial tissue have no competitive impact on the prices or sales of retail facial tissue. Manufacturers do not consider the possibility of diverting sales of facial tissue from C&I customers to retail customers. C&I customers do not resell C&I facial tissue to retail outlets or individual consumers.

16. Retail facial tissue is thus a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act. A small but significant and nontransitory increase in the price of retail facial tissue would not cause a significant number of customers to turn to other products or to similar products sold in different distribution channels.

17. Relevant Geographic Market. Kimberly-Clark manufactures retail facial tissue for sale in the United States in facilities located in New Milford, Connecticut; Beech Island, South Carolina; Neenah, Wisconsin; Fullerton, California; and Ogden, Utah. Scott manufactures retail facial tissue for sale in the United States at three facilities: Fort Edward, New York; Marinette, Wisconsin; and Everett, Washington. Kimberly-Clark, Scott and Procter & Gamble compete with one another for sales of retail facial tissue throughout the United States.

18. There are virtually no imports of retail facial tissue

into the United States. American manufacturers of facial tissue export to Canada, but United States retail stores cannot constrain United States prices by purchasing facial tissue from customers outside the United States and transporting it back into this country. Such diversion, or arbitrage, is not practical because of the high cost of transporting facial tissue, the lack of brand awareness of foreign products among U.S. consumers, and the significant differences in packaging between foreign and domestic facial tissue.

19. The United States is thus a section of the country, or relevant geographic market, within the meaning of Section 7 of the Clayton Act. Throughout the United States, consumers are likely to pay higher prices for facial tissue as a result of this acquisition, and U.S. consumers would not be able to substitute products sold by foreign manufacturers.

20. Anti-Competitive Effects. Kimberly-Clark manufactures the dominant brand of facial tissue sold to consumers in the United States, a brand so familiar that it is almost synonymous with facial tissues: Kleenex®. Nationally, Kleenex® brands (including regular Kleenex®, Kleenex Ultra® and KleenexSoftique®) have a market share (measured in 1994 revenues) of approximately 48.5 percent. Scott, which manufacturers Scotties® facial tissue, is the third largest producer of branded facial tissue in the United States, with a market share (measured in 1994 revenues) of approximately 7 percent. Only one other manufacturer, Procter & Gamble, sells a significant amount of

retail facial tissue in the United States. The parties' combined sales of facial tissue would be nearly twice those of Procter & Gamble, which holds a market share (measured in 1994 revenues) of approximately 30 percent.

21. Kimberly-Clark and Scott compete vigorously against each other to sell Kleenex® and Scotties® facial tissue to retailers for resale to consumers, to provide the best quality product and service, and to develop new facial tissue products. This direct, targeted competition between Kleenex® and Scotties® benefits consumers through lower prices, more frequent promotions and couponing and other marketing strategies designed to attract facial tissue consumers to their respective brand and away from the other's brand. If the combination of Kimberly-Clark and Scott were permitted, this competition would be eliminated.

22. Using a measure of market concentration called the HHI, defined and explained in Appendix A, a combination of Kimberly-Clark and Scott would substantially increase concentration in the market for facial tissue, a market which is already highly concentrated. The approximate post-merger HHI for the relevant market based on 1994 dollar sales would be 4031 with a change resulting from the merger of 705 points. After the acquisition, Kimberly-Clark would have a market share of approximately 56 percent and the two largest manufacturers of retail facial tissue -- Kimberly-Clark and Procter & Gamble -- would have together a market share of approximately 90 percent (both shares measured in revenues).

23. After the acquisition, Kimberly-Clark would control both Kleenex® and Scotties®, and it would have market power unilaterally to increase the price of those brands to consumers. In response to a Kimberly-Clark price increase on Kleenex® and Scotties® facial tissue, consumers would not switch to other brands or private label retail facial tissue in sufficient numbers to render Kimberly-Clark's price increase unprofitable.

24. Moreover, after the proposed acquisition, there would be a substantial danger to consumers that industry-wide prices would increase. Post-merger, with only one significant competitor remaining, the elimination of Scott as an independent competitor increases the likelihood of coordinated pricing among the two major competitors.

25. Establishing a new successful brand of retail facial tissue in the United States is difficult, time-consuming and costly. Estimates of the cost of constructing a tissue manufacturing plant range from $80 million to $180 million for equipment, and $80 million for land and a facility. Advertising and promotional expense for a new brand would exceed $25 million over a three-year introductory period. It is unlikely that timely and sufficient entry of new retail facial tissue manufacturers would prevent harm to competition caused by Kimberly-Clark's acquisition of Scott.

B. Retail Baby Wipes

26. Baby wipes are soft, moist sheets the size of a wash cloth and packaged in hygienic plastic tubs. Consumers use them to clean babies, especially during diapering. The base sheet is made from a mixture of wood pulp and synthetic fibers. This sheet is combined with a wet formulation that consists largely of water with additional ingredients designed to make cleaning the baby easier and to maintain the freshness of the wipes.

27. Relevant Product market. The advantages of baby wipes over wash cloths, alcohol-based moist towelettes, paper towels, bath tissue, facial tissue and cotton balls include greater sanitation, convenience, strength, absorbency, and gentleness on babies' skin. For their intended use, baby wipes have no good substitutes. They are used in approximately 95 percent of all American homes with young children.

28. Almost all baby wipes are sold through retail channels. Retail baby wipes are sold by manufacturers to retail outlets, which resell them to consumers. Only a small volume of baby wipes are sold to institutional customers. Manufacturers do not consider the possibility of diverting sales from institutional accounts to retail accounts when setting the price of retail baby wipes. Institutional customers would not resell baby wipes to retail outlets or to individual customers to defeat a retail price increase.

29. Baby wipes thus constitute a line of commerce and a relevant product market within the meaning of Section 7 of the

Clayton Act. There are no reasonably interchangeable substitutes for baby wipes to which a significant number of baby wipe consumers would switch in response to a small but significant, nontransitory market wide increase in price that would make such a price increase unprofitable.

30. Relevant Geographic Market. Kimberly-Clark manufactures baby wipes at its plant in Maumelle, Arkansas. Scott produces baby wipes at its plant in Dover, Delaware. From these plants, each firm sells baby wipes throughout the United States.

31. There are virtually no imports of retail baby wipes into the United States. American manufacturers of baby wipes export to Canada, but United States retail stores cannot constrain United States prices by purchasing baby wipes from customers outside the United States and transporting them back into this country. Such diversion, or arbitrage, is not practical because of the high cost of transporting baby wipes, the lack of brand awareness of foreign products among U.S. consumers, and the significant differences in packaging between foreign and domestic brands. 32. The United States is thus a section of the country, or relevant geographic market, within the meaning of Section 7 of the Clayton Act. Throughout the United States, consumers are likely to pay higher prices for baby wipes as a result of this acquisition, and U.S. consumers would not be able to substitute products sold by foreign manufacturers.

33. Anti-Competitive Effects. Kimberly-Clark and Scott are

by far the two largest and most significant sellers of retail baby wipes in the United States, with a combined market share (measured in 1994 revenues) of 56 percent. Kimberly-Clark manufactures Huggies® brand name baby wipes, and Scott manufactures baby wipes under the brand names Baby Fresh® and Wash A Bye Baby®. Huggies® and Baby Fresh® are each other's primary competitor in the sale of baby wipes. As the two leading suppliers in this market, Kimberly-Clark and Scott compete aggressively in pricing, promotion, and product innovation. Their combination would halt the flow of these consumer benefits resulting from this rivalry.

34. A combination of Kimberly-Clark and Scott would substantially increase concentration in the market for baby wipes, a market which is already highly concentrated. The approximate post-merger HHI for the relevant market based on 1994 dollar sales would be 3137, with a change resulting from the merger of 1501 points.

35. The dominant market share that the proposed merger would give Kimberly-Clark underestimates the likely anticompetitive effect of the merger. In the baby wipes market, Huggies® and Baby Fresh® are perceived by consumers as the highest quality baby wipes in the market and the closest substitutes for each other. Most of the baby wipes not sold by Kimberly-Clark and Scott are sold under various private labels. Private label baby wipes are not viewed by most consumers as being close substitutes for Huggies® and Baby Fresh®. Private

label products have not significantly constrained Huggies® and Baby Fresh® prices.

36. After the merger, Kimberly-Clark would have market power unilaterally to increase the price of Huggies® and Baby Fresh®. In response to a Kimberly-Clark price increase on Huggies® and Baby Fresh®, consumers would not switch to other brands or to private label baby wipes in sufficient numbers to render Kimberly-Clark's price increase unprofitable.

37. Successful new entry into the manufacture and sale of baby wipes is difficult and costly, and would not be sufficient to counteract in a timely fashion the anticompetitive effects described in this Complaint. Entry would require an investment of nearly $100 million over a two year period just to acquire the capacity to produce baby wipes for sale nationwide. Even with the necessary capacity, an entrant would need to spend millions of dollars more in product development, advertising and promotion before achieving significant sales.

IV. HARM TO COMPETITION

38. Pursuant to an Agreement and Plan of Merger dated July 16, 1995, Kimberly-Clark agreed to acquire all of the outstanding stock of Scott.

39. The effects of the proposed transaction may be to lessen competition substantially and tend to create a monopoly in interstate trade and commerce in violation of Section 7 of the Clayton Act.

40. The transaction would have the following effects, among

others:

a. competition generally in the retail facial tissue and baby wipes markets would be substantially lessened;

b. actual and potential competition between Kimberly-Clark and Scott in the market for retail facial tissue would be eliminated in the United States;

c. prices for retail facial tissue in the United States would be likely to increase;

d. product innovation in retail facial tissue in the United States would suffer;

e. actual and potential competition between Kimberly-Clark and Scott in the market for retail baby wipes would be eliminated in the United States;

f. prices for retail baby wipes in the United States would be likely to increase;

g. product innovation in retail baby wipes in the United States would suffer.

VI. REQUESTED RELIEF

Plaintiffs request:

1. That the proposed acquisition of Scott by Kimberly-Clark be adjudged to be in violation of Section 7 of the Clayton Act;

2. That the defendants be permanently enjoined from carrying out their Agreement and Plan of Merger dated July 16, 1995, or from entering into or carrying out any

agreement, understanding or plan, the effect of which would be to combine the businesses or assets of Kimberly-Clark and Scott;

3. That Plaintiffs be awarded the costs of this action; and

4. That Plaintiffs have such other relief as the Court may deem just and proper.

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Dated: December 11, 1995

APPENDIX A

DEFINITION OF "HHI"

"HHI" means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of thirty, thirty, twenty, and twenty percent, the HHI is 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1000 and 1800 are considered to be moderately concentrated, and those in which the HHI is in excess of 1800 points are considered to be highly concentrated. Transactions that increase the HHI by more than 100 points in highly concentrated markets presumptively raise significant antitrust concerns under the Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines.

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VERIFICATION OF COMPLAINT

I, Anthony E. Harris, declare:

1. I am an attorney with the United States Department of Justice, Antitrust Division.

2. The foregoing complaint for and on behalf of the United States of America and the State of Texas was duly prepared under the direction of the Attorney General of the United States and the Attorney General of the State of Texas. The facts stated therein have been assembled by authorized employees and counsel for the United States of America and the State of Texas. The allegations therein are true and correct to the best of my knowledge, information, and belief.

I declare under penalty of perjury that the above is true and correct.

Executed on: December 11, 1995

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